IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 03.12.2007

Coram:

THE HONOURABLE MR.JUSTICE S.TAMILVANAN

A.S.No.523 of 1996

1.Kumarasamy
2.Yoganathan ..Appellants/2 & 3rd Defendants

vs.

1.Chinnammal
2.Pavayammal
3.Valliammal
4.Pavayammal
5.Chinnimalai Gounder
6.Chidambaram
7.Nachimuthu
(Respondents 3 to 7 remained
exparte during trial in the lower court
and no summons are required) .. Respondents/1 & 2nd Plaintiffs/1,4 to 7 Defendants

Prayer: Appeal filed against the judgment and decree dated 28.11.1995 made in O.S.No.525 of 1991 on the file of the I Additional Subordinate Judge, Erode.

For Appellants : Mr.M.M.Sundaresh

For Respondents : Mr.K.S.Karthik Raja
for M/s.T.R.Rajaraman

J U D G M E N T

This appeal has been preferred against the judgment and decree dated 28.11.1995 made in O.S.No.525 of 1991 on the file of the First Additional Subordinate Judge, Erode.

2.The appellants herein are the defendants 2 to 3 before the trial Court. The suit was filed by the respondents 1 and 2 herein seeking for partition and separate possession of 'A' and 'B' schedule properties, mesne profits and for other consequential reliefs.

3.It is seen that in support of the claim of the respondents/plaintiffs, the second respondent was examined as P.W.1 apart from Chennimalai Gounder examined as P.W.2 and Exs.P1 to P7 were marked. The first appellant/D2 was examined as D.W.1 apart from examining one Udayakumar as D.W.2 and Exs.B1 to B8 were marked on the side of the defendants.

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4.The trial Court considering the oral and documentary evidence has passed the impugned judgment whereby held that each one of the first and second respondents/plaintiffs is entitled to 5/72 share in 'A' schedule property and accordingly, a preliminary decree for partition was passed. So far as 'B' schedule property is concerned, the suit was dismissed by the trial Court. Aggrieved by the same, the second and the third defendants in the suit have preferred this appeal.

5.Mr.M.M.Sundaresh, learned counsel appearing for the appellants would contend that the trial Court should have held that the 'A' schedule property was not a separate property of the common ancestor Thambana Gounder, but joint family property of Thambana Gounder and his two sons and that the respondents 1 and 2/Plaintiffs are not at all entitled to 5/72 shares each, in the plaint 'A' schedule property. It is seen that the appellants herein have claimed right in the property, saying that the respondents 1 and 2 had relinquished rights in favour of others on payment of fixed sum of rupees and that the court below had not considered the oral and documentary evidence pleaded by the appellants herein.

6.The point for consideration in this appeal is:-

i) whether the finding of the trial Court holding that the respondents 1 and 2 each are entitled to 5/72 shares in the plaint 'A' schedule property is not sustainable as contended by the appellants?

ii) Whether the appeal has to be allowed based on the grounds of appeal?

7.The certified copy of the sale deed dated 02.09.1936 executed in favour of Thambana Gounder and another has been marked as Ex.A1 through P.W.1 and a copy of the registered partition deed dated 05.05.1958 has been marked as Ex.A2. The first appellant as D.W.1 has admitted in his deposition that originally there was partition between his father and paternal uncle. It has been admitted that Thambana Gounder, his grandfather had purchased the property under Ex.A1 sale deed.

8.It is not in dispute that the first respondent is the mother of the second respondent. The first appellant is the brother of the second respondent and the second appellant is his son and the fourth respondent is sister of Ramasamy Gounder and the fifth respondent is the brother of the Ramasamy Gounder and son of Thambana Gounder. According to the respondents 1 and 2/plaintiffs, Thambana Gounder purchased the property, under Ex.A 1 which is being called as vaduvan kadu, apart from the same, he had ancestral property. She had admitted that there was partition between her father and paternal uncle and in the partition 1/3 share was allotted to Thambana Gounder, which was enjoyed by him as his own property along with the aforesaid self acquired property. Before filing suit for partition, the respondents 1 and 2 herein had sent a legal notice to the defendants. In support of the same, a copy of the notice and the postal acknowledgment and also returned postal covers were also produced. Ex.B1 is the original partition deed dated 05.05.1998 and the subsequent partition deed dated 31.05.1985 has been marked as Ex.B2 apart from marking Chitta and Adangals as Ex.B3 to Ex.B5 with kist receipts.

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9.It is an admitted fact that the property described in Ex.A1, was purchased by Thambana Gounder and as such the same could be his self acquired property and it was not subjected to the subsequent partition. The evidence of the first appellant/Dw1, would clearly show that in the ancestral property, the respondents 1 and 2 are entitled to 5/72 shares each. Based on the oral and documentary evidence, the court below has held that the respondents 1 and 2 each are entitled to 5/72 shares in the plaint 'A' schedule property and accordingly, passed the preliminary decree for partition. With regard to 'B' schedule property, the suit was dismissed by the trial court against which, no cross appeal has been filed and therefore, as far as 'B' schedule property is concerned, the reason given by the court below has reached its finality.

10.Considering the impugned judgment and also the oral and documentary evidence available on record and the arguments advanced on both sides, I am of the considered view to hold both the points for consideration in this appeal in favour of the respondents 1 and 2 and against the appellants and no interference is called for in the impugned judgment and decree passed by the Court below in favour of respondents 1 and 2. In the result, the appeal fails and the same is dismissed. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

The I Additional Subordinate Judge,
Erode.

Copy to

The Section Officer,
V.R.Section, High Court, Madras.

1 cc To Mr.M.M.Sundresh, Advocate, SR.72106.
1 cc To Mr.T.R.Rajaraman, Advocate, SR.71276.

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